

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

QINGDAO FREE TRADE ZONE GENIUS)	
INT'L TRADING CO., LTD., a)	
foreign corporation,)	No. 08-1292-HU
)	
Plaintiff,)	
)	
v.)	OPINION AND
)	
P and S INTERNATIONAL, INC.,)	ORDER
an Oregon corporation,)	
)	
Defendant.)	
_____)	

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HUBEL, Magistrate Judge:

This is a petition by a Chinese company, Qingdao Free Trade
Zone Genius Int'l Trading Co. (Qingdao), to enforce an arbitral

1 award handed down in China against P and S International, Inc. (P
2 & S), an Oregon lumber and wood products trading company. Paul
3 Lewis is one of the two principals in P & S and serves as its
4 President and Treasurer. The other principal is Lewis's wife,
5 Sungyi Kang, a Korean. P & S is in the wood products and lumber
6 trading business, buying and reselling wood products. The matter
7 before the court is P & S's motion for summary judgment.

8 In late 2005 and early 2006, P & S sold a shipment of
9 eucalyptus chips through a broker located in Shanghai, to Shandong
10 Asia Pacific SSYMB Pulp & Paper Co. (SSYMB) SSYMB is situated in
11 the north of China, and the chips were delivered to the port of
12 Qingdao. SSYMB did not pay for the chips, and P & S was involved in
13 an ongoing dispute with SSYMB. Lewis Declaration ¶ 3. P & S
14 contacted plaintiff Qingdao to broker the sale of wood chips to a
15 substitute purchaser. Id. at ¶¶ 3, 4. Qingdao arranged for a sale
16 of the chips to Shandong Chenming Paper Holdings Ltd. (Chenming).
17 In addition, Qingdao introduced P & S to its lawyer and assisted P
18 & S in initiating a proceeding in China to recover from SSYMB. Id.
19 at ¶ 4.

20 Qingdao and P & S entered into a sales contract on April 28,
21 2006. Petition, Exhibit 1. The sales contract is less than a page
22 long, written in English, and provides, in part:

23 Any dispute arising from the execution of, or in
24 connection with, this Sales Contract should be settled
25 through negotiation. In case no settlement can be
26 reached, the case shall then be submitted to Qingdao
Arbitration Commission for arbitration according to the
Commission's Rules of Arbitration. The award rendered by

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1 the Commission shall be the final and binding [sic] upon
2 both parties.

3 Id.

4 Under the sales contract, Qingdao was to purchase the cargo of
5 3,000 "bone dry" metric tons (BDMT) of eucalyptus wood chips from
6 P & S, for the sum of \$150,000, with the ultimate purchaser being
7 Chenming. Chenming was to confirm the actual weight and quality of
8 the cargo when it arrived. When the cargo arrived in port, Qingdao
9 advanced charges and fees related to the cargo, including sea
10 transportation fee, container repairing charge, delayed customs
11 declaration charge, storage charges, and handling charges, in the
12 amount of \$44,911.88. Chenming refused the cargo, on the grounds
13 that it was underweight and had too high a moisture content. After
14 Chenming rejected the cargo, Qingdao and P & S had a dispute about
15 what was owed each party: P & S demanded \$150,000 for the cargo
16 from Qingdao and Qingdao demanded reimbursement of the \$44,911.88
17 for shipping and customs charges.

18 Qingdao submitted a claim to arbitration in China for the
19 \$44,911.88, plus interest. The parties dispute whether Qingdao ever
20 told P & S it contemplated initiating an arbitration. Lewis states
21 in a declaration that P & S was not so informed. Lewis Declaration
22 ¶ 8. However, Qingdao proffers two emails from Li Chenzhong of
23 Qingdao, addressed to Paul Lewis and dated September 2, 2006 and
24 September 22, 2006, respectively. Both emails are in English. The
25 earlier email says:

26 You should understand that your company signed the
27 contract on 28th of April with our company which showing
[sic] that your company agreed to accept Chenming's

1 inspection result. No body force you to do it. We suggest
2 you and we should go to Qingdao Arbitration Commission
3 for arbitration. The commission will give us a fair
4 adjudication. We have to do it. We must do it, if you do
5 not pay us the money which we firstly paid instead of
6 your company.

7 Hall Declaration ¶¶ 3, 4, Exhibits 2, 3. P & S moves to strike this
8 evidence on the ground that the statements in the Hall Declaration
9 are not made by a witness with knowledge because Hall is Qingdao's
10 attorney.

11 Qingdao filed a petition with the arbitration commission on or
12 about December 6, 2006. Hall Declaration, ¶ 2, Exhibit 1, p. 9. The
13 commission mailed a group of documents to P & S, two in Chinese and
14 two in English. The English documents were pamphlets, one titled
15 "Qingdao Arbitration Commission Arbitration Rules," and the other
16 a list of arbitrators. The sales contract between P & S and Qingdao
17 was not included in the mailing, and none of the documents
18 contained Qingdao's name in English. Lewis states in his
19 declaration that he thought the papers related to the dispute with
20 SSYMB that was "being handled by the lawyer acting for us in
21 China." Id. at ¶ 8. There is no indication of when Lewis received
22 the documents, but it was apparently after December 6, 2006, and
23 before February 13, 2007.

24 The commission appointed an arbitrator on February 13, 2007.
25 Hall Declaration ¶ 2, Exhibit 1. P & S did not make an appearance.
26 On June 14, 2007, the arbitrator made findings and awarded Qingdao
27 \$57,473.26. Id. On April 22, 2008, after Qingdao was unable to
28 enforce the judgment in China because P & S had no property there,
Qingdao sent a copy of the arbitration award and an English

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1 translation by certified mail to P & S. P & S has not paid the
2 amount awarded.

3 P & S moves for summary judgment in its favor, asserting that
4 the arbitration award is unenforceable because P & S was not
5 notified of the arbitration in English and therefore did not
6 receive due process.

7 **Standard**

8 The Convention on the Recognition and Enforcement of Foreign
9 Arbitral Awards, 9 U.S.C. § 201 (the New York Convention),
10 provides that "[a] court shall confirm the award unless it finds
11 one of the grounds for refusal or deferral of recognition or
12 enforcement of the award specified in the said Convention." 9
13 U.S.C. § 207. The party opposing confirmation bears the burden of
14 proving that one of the seven defenses under the New York
15 Convention applies. See, e.g., Imperial Ethiopian Gov't v. Baruch-
16 Foster Corp., 535 F.2d 334, 336 (5th Cir. 1976); First State Ins.
17 Co. v. Banco de Seguros del Estado, 254 F.3d 354, (1st Cir. 2001);
18 Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.,
19 403 F.3d 85, 90 (2d Cir. 2005). The burden is a heavy one, and the
20 showing required to avoid summary confirmation of the award is high.
21 Encyclopaedia Universalis, 403 F.3d at 90. Judicial review is "very
22 limited," to avoid undermining the twin goals of arbitration:
23 settling disputes efficiently and avoiding long and expensive
24 litigation. Id.

25 The New York Convention provides that enforcement will be
26 denied when

1 [t]he party against whom the award is invoked was not
2 given proper notice of the appointment of the arbitrator
or of the arbitration proceedings or was otherwise unable
to present his case.

3 Id. at Art. V(1)(b). P & S asserts that enforcement should be
4 denied in this case because it was not given proper notice of the
5 arbitration proceedings.

6 **Discussion**

7 P & S relies significantly on Iran Aircraft Indus. v. AVCO
8 Corp., 980 F.2d 141 (2d Cir. 1992), a case in which a party relied
9 on a representation by an arbitrator that summaries of invoices
10 could be submitted, and then lost the case (before different
11 arbitrators) because of a lack of proof, i.e., the invoices. The
12 court held:

13 the defense provided for in Article V(1)(b) essentially
14 sanctions the application of the forum state's standards
15 of due process [and] due process rights are entitled to
16 full force under the Convention as defenses to
enforcement. Under our law, the fundamental requirement
of due process is the opportunity to be heard at a
meaningful time and in a meaningful manner. Accordingly,
17 if Avco was denied the opportunity to be heard in a
18 meaningful time or in a meaningful manner, enforcement of
the Award should be refused pursuant to Article V(1)(b).

19 980 F.2d at 145 (internal quotations and citations omitted).

20 P & S argues that in order to comply with due process
21 standards, notice must be "reasonably calculated, under all the
22 circumstances, to apprise interested persons of the pendency of the
23 action and afford them an opportunity to present their objections,"
24 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314
25 (1950) so that failure to provide a translation in a language
26 understood by a defendant "may, in some instances, constitute a

1 denial of due process," Vazquez v. Sund Emba AB, 152 AD2d 389, 499,
2 548 NYS2d 728 (1989). P & S relies most directly on a California
3 state case, Julen v. Larson, 25 Cal. App.3d 325, 101 Cal. Rptr. 796
4 (1972), in which the court affirmed the entry of summary judgment
5 for defendant and refused to enforce a Swiss court's judgment on
6 the ground that the service of Swiss process, in German, did not
7 give defendant sufficient notice of the pending Swiss action, so
8 that the Swiss court never acquired personal jurisdiction over the
9 defendant.

10 In Julen, the court found no evidence that the defendant
11 acquired knowledge in fact of the action pending against him in
12 Switzerland. The evidence showed that the defendant did not
13 understand German, and the accompanying correspondence did not
14 identify the documents as materials of legal significance. The
15 court concluded,

16 While we do not require documents in a foreign language
17 to be translated into English in order to be validly
18 served, we think at a minimum a defendant should be
19 informed in the language of the jurisdiction in which he
20 is served ... that a legal action of a specific nature is
21 pending against him at a particular time and place.
22 Normally this information should include the location of
23 the pending action, the amount involved, the date
24 defendant is required to respond, and the possible
25 consequences of his failure to respond. ... We emphasize
26 that no great amount of formality is required for
27 effective notice.

28 P & S argues that the situation in this case is analogous to that
in Julen, and that this court should reach the same result.

Qingdao responds that 1) P & S agreed in the sales contract to
settle any dispute through the Qingdao Arbitration Commission; 2)
the sales contract also stated that an arbitration would be

1 conducted according to the Qingdao Arbitration Commission's Rules
2 of Arbitration; 3) P & S received an English copy of the Qingdao
3 Arbitration Commission Arbitration Rules and an English copy of the
4 list of arbitrators; 4) Rule 67 of the Commission Arbitration Rules
5 states that the "Chinese language is the working language of the
6 Arbitration Commission," so that by signing the contract P & S
7 consented to notice in Chinese;¹ 5) P & S was aware of a dispute
8 with Qingdao arising from the Chenming inspection; 6) P & S was not
9 paid under the terms of the contract with Qingdao; and 7) P & S had
10 a prior and ongoing legal dispute in China with SSYMB. Qingdao
11 asserts that these circumstances show that P & S received notice
12 reasonably calculated to inform it that the arbitration proceeding
13 had been commenced.

14 While these circumstances could lead to the inference that P
15 & S knew it had agreed to arbitrate disputes with Qingdao in China,
16 and had reason to suspect that arbitration proceedings in China
17 might be brought against P & S by Qingdao or SSYMB, they do not
18 generate an inference that P & S had actual knowledge that Qingdao
19 had commenced an arbitration proceeding, to take place on a
20 particular date in a particular place. Nor does the contract P & S
21 contain a provision under which P & S agreed to service of process
22 in Chinese.

23 There is no dispute that the arbitration rules set out in
24 English did not state that arbitration was pending against P & S at

25
26 ¹ The contract between Qingdao and P & S contains no express
27 provision under which P & S agreed to service of process or any
other notification in Chinese.

1 a particular time and place. The arbitration rules, however, do
2 state:

3 The Arbitration Commission shall, within 10 days as from
4 the date of taking cognizance of a case, serve an
5 Arbitration Rules and a Panel of Arbitrators to the
6 Claimant, and one copy of the Application for
7 Arbitration, the Arbitration Rules and the Panel of
8 Arbitrators to the Respondent.

9 The Respondent shall, within 15 days from the date of
10 receipt of the Application for Arbitration, submit his
11 written defense to the Arbitration Commission. The
12 Arbitration Commission shall, within 5 days from the date
13 of receipt of the written defense, serve the copy of the
14 written defense to the Claimant.

15 Lewis Declaration Exhibit B, Article 13. The English documents do
16 not state that cognizance has been taken of a case, and do not name
17 Qingdao or P & S, the amount involved in the dispute, and do not
18 provide a date from which the time lines set out in Article 13 may
19 be calculated.

20 The Chinese documents contain the name and address of P & S in
21 English, as well as some Arabic numbers and what appear to be dates
22 embedded among Chinese characters. The most significant are
23 44911.88 (without a dollar sign), which is the amount claimed by
24 Qingdao as reimbursement, see id. at p. 3, 4, 15, 18, and what
25 appears to be a date and time: 2007, 4, 4, 9:30. Id. at p. 10.
26 They also contain, in English, the phone number, fax number, and
27 address of the Qingdao Arbitration Commission.

28 I conclude that the documents and circumstances of this case--
regardless of whether the emails from Li Chenzhong to Paul Lewis
are considered or not--do not demonstrate that P & S received
notice reasonably calculated, under all the circumstances, to

1 apprise them of the pendency of the arbitration and afford them an
2 opportunity to be heard.

3 **Conclusion**

4 Defendant's motion for summary judgment (doc. # 5) is GRANTED.
5 Defendant's motion to strike portions of the Hall Declaration (doc.
6 # 26) is DENIED as moot.

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8 IT IS SO ORDERED.

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10 Dated this 16th day of September, 2009.

11
12 /s/ Dennis James Hubel

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14 Dennis James Hubel
15 United States Magistrate Judge
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